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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Carriage of the Transmissions )  
of Digital Television Broadcast )  
Stations )  
 )  
Amendments to Part 76 )  
of the Commission's Rules )

CS Docket No. 98-120

REPLY COMMENTS OF AMERICA'S VOICE, INC.

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## SUMMARY

America's Voice supports Option 7 - no must carry for DTV signals until broadcasters return their analog channels - because America's Voice believes that the best way to expedite the transition to digital is to maximize the total amount of digital programming available to consumers. Broadcasters can offer digital programming over the air while cable networks such as America's Voice can only reach consumers over cable and satellite. Dual analog/digital must carry would reduce, not increase, the diversity of First Amendment speakers, and cannot be upheld under the *Turner II* case.

America's Voice is an independent new cable network that has had to compete for carriage with other programmers, including paying incentive fees for carriage where necessary. Despite the expected increase in cable channel capacity with digital cable, the number of new program offerings has, and will continue to outstrip capacity. America's Voice would be blocked or displaced by dual digital analog must carry, in favor of new broadcast networks that acquire fringe UHF stations and largely air syndicated entertainment programming.

In *Turner II* the Supreme Court voted 5 to 4 to approve analog must carry in order to preserve independent television stations as source of diverse viewpoints. Many of these independents have since been absorbed into new networks, these

new networks largely have eschewed news and public affairs programming, while new cable channels and the Internet have arisen as important sources of news and information programming. The Commission cannot ignore the changes in circumstances since *Turner II* and must interpret the must carry statute so as to avoid constitutional doubt.

The Commission need not adopt a sweeping re-write of the must carry rules that would harm America's Voice in a constitutionally impermissible manner. On the contrary, Option 7 is entirely consistent with and sufficient under the must carry statute. The law only requires carriage of "a", i.e. one, signal of each station, and only a "regularly assigned" channel, not a temporary, transitional channel. Any more expansive reading of the law is inconsistent with other provisions, all of which are based upon an expectation of carriage of one signal from each station.

The Commission will do best to forbear from regulation and allow industry negotiations and market place forces to follow consumer choice in what DTV signals are carried on cable and how much cable subscribers will have to spend for new equipment. The transition to digital technology and the return of the analog television spectrum will best be promoted by Option 7 since that option will foster the greatest diversity of digital programming on cable and over the air.

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To: The Commission

**REPLY COMMENTS OF AMERICA'S VOICE, INC.**

America's Voice, Inc. ("America's Voice"), respectfully submits these Reply Comments in response to the Commission's *Notice of Proposed Rulemaking (NPRM)*.<sup>1/</sup> America's Voice supports Option 7 as the only content neutral option that will not impinge upon the First Amendment rights of America's Voice, and which is entirely consistent with the must carry statute.

**I. The Public Interest Would Not Be Served By Content Regulation That Would Displace America's Voice In Favor Of New Broadcast Networks And Independents.**

America's Voice fails to perceive the public interest in cable content regulation that would guarantee carriage of broadcast networks and independent stations to the detriment of America's Voice. America's Voice produces original programming

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<sup>1/</sup> America's Voice is a Washington, D.C. based video programmer serving many cable television systems and direct to home subscribers which has been in operation since December, 1993.

that provides a forum for viewers to learn about and express their views on public policy issues, while those seeking must carry status produce primarily entertainment programming and/or re-run older syndicated entertainment programs.

**A. America's Voice Produces Original Programming That Addresses Issues Of Concern To Its Viewers And Provides A Forum For Them To Disseminate Their Viewpoints.**

America's Voice is a 24 hour, seven day a week video network that produces original programming concerning the political issues facing American citizens. America's Voice carries many hours each week of programming that it produces that directly addresses what it believes to be the issues of concern to voters today and also provides viewers with the ability to interact and voice their concerns over the air and through the Internet. For example, during the recent mid-term elections, America's Voice carried election coverage from 7PM until 1AM. Few networks, even the major news networks, provided such extensive coverage of the elections.

But there are many networks that provide election night coverage - what sets America's Voice apart is that it covers the issues that concern voters not just one night a year or every other year, but 365 days a year, every year. In a typical week, America's Voice produces and airs over 50 hours of programming. By producing this programming itself, America's Voice is able to

provide up-to-the minute, topical programming on issues that concern the public.

This original programming would not exist but for America's Voice. By producing this new programming, America's Voice makes a significant contribution to viewer choice and is adding a source of information on issues for viewers who are looking for information and debate.

The programming on America's Voice includes call-in and e-mail-in programming where viewers can participate and express their views. America's Voice thus provides an opportunity for viewers to express and disseminate their views. The more cable carriage America's Voice is able to obtain, the greater is the reach and opportunity for participating viewers to disseminate their views and contribute to the public debate.

**B. New Broadcast Networks and Independents Carry Primarily Syndicated Entertainment Programming And Old "Re-runs".**

Broadcasters base their claim to digital must carry on an alleged need to guarantee access to cable channels for new broadcast networks and independent broadcast stations. For example, NAB refers to cable's alleged, "record of refusing carriage to local broadcasters, **primarily independents**",<sup>2/</sup> and ALTS indicates it represents, "stations not affiliated with the ABC, CBS, or NBC television network (sic), but only truly

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<sup>2/</sup> NAB Comments (hereafter "NAB") at i.



independent stations **and local television stations affiliated with the Fox, PAXtv, UPN and WB networks.**"<sup>3/</sup>

To the extent that the new networks mentioned by ALTS produce original programming, it tends to be entertainment programming.<sup>4/</sup> Rather than producing new programming, even of an entertainment nature, the new networks cited by ALTS appear largely to carry syndicated entertainment programming that they did not produce and that in many cases already has been aired on another network. Similarly, independent stations typically carry syndicated entertainment programming, a staple of which is so-called "re-runs" of old network shows, some of which dates back to the era of bell bottom pants and cars with fins.

Displacing America's Voice, or preventing America's Voice from gaining a position on a new digital service tier in order to "preserve" viewer access primarily to entertainment programming, especially re-runs of old, syndicated shows, would not appear to serve the public interest. Access to the new digital universe is an essential element of the business plan of America's Voice. With the acknowledged scarcity of channel capacity on analog

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<sup>3/</sup> ALTS Comments (hereafter "ALTS") at 1 (emphasis added).

<sup>4/</sup> Fox obviously produces significant news and public affairs programming, but Fox elected retransmission consent and used it to launch a new cable network ("FX"). Fox paid significant incentive fees and did not use must carry or retransmission consent to launch the Fox News Channel. Although ALTS claims to represent the interests of Fox affiliates, Fox appears not to have filed in support of must-carry.

tiers, a digital strategy for both cable television and DBS carriage is vital to the continued growth of America's Voice.

**II. Must Carry Is Not Necessary To Induce Broadcasters Or Consumers To Transition To Digital Technology.**

Broadcasters' claims that without digital must carry the transition to digital will fail ring hollow to America's Voice as it has had to launch its service with no guarantee of success and believes that the quality programming it provides would serve equally well to induce consumers to transition to digital service.<sup>5/</sup>

**A. America's Voice Launched Its Network With No Guarantee Of Success From The Commission And Is Counting On New Digital Service Tiers To Expand Its Audience.**

In order to launch its new network, America's Voice had to raise capital, secure talent, and compete for carriage on cable systems against other programmers, including broadcast networks and stations. America's Voice did not have the benefit either of must carry or a tie-in to retransmission consent. It is not affiliated with any of the broadcast networks, nor with any cable MSO.

America's Voice raised entrepreneurial capital, produced pilot programming and convinced enough cable systems to carry the service in order to be able to launch the new network. America's Voice had to hire a sales force and sell advertising on the

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<sup>5/</sup> NAB at 7 and 12.

channel in order to support itself financially, in the same manner as any advertiser supported network or independent television station.

Moreover, America's Voice has like many other programmers, had to pay incentive/marketing fees in order to obtain carriage on some cable systems. While these funds could otherwise be used to produce more or better programming, in a competitive market for limited cable "shelf-space", America's Voice must offer fees in some cases to obtain carriage. It is clear that by increasing its audience, America's Voice can generate more advertising revenue and more viewer demand for carriage.

As is apparent, these strategies involve substantial risks. In many cases, America's Voice is simply unable to obtain analog carriage because of lack of available channel space. Thus, America's Voice had to launch its network knowing full well that it might be unable to obtain carriage on many cable systems, and might have to pay for carriage on others.

One of the factors America's Voice counted on in mitigating the risks it faced was the development of new digital technology that would be offered on cable systems in new digital service tiers, providing new opportunities for America's Voice to obtain carriage on previously channel blocked systems. However, America's Voice also recognized that it is not alone in competing for new digital channel capacity and that other cable networks

also have been and are being launched. In America's Voice's experience, the number of new networks has and continues to outpace the growth in channel capacity, and this is likely to continue to be the case.

**B. The Commission Should Reject Broadcaster Demands For "Certainty" As Well As The Request For Spectrum-Hogging "Technical Standards".**

Given America's Voice's experience in launching its network, America's Voice is nothing short of incredulous at the broadcasters' demands in this proceeding.<sup>6/</sup> NAB asserts that only if broadcasters have "certainty" of cable carriage will they "have the incentive to aggressively continue their plans to borrow money, hire consultants, order DTV equipment and push ahead to their DTV future."<sup>1/</sup> Cable program services such as

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<sup>6/</sup> Broadcasters candidly admit that their original motivation in proposing HDTV was to prevent mobile communication use of vacant broadcast spectrum for as long as possible. **"EM: Is it fair to say that this [HDTV] was generated primarily as a way to keep channels? Mr. [John] Able:** Yeah, keep channels. At the time, it was definitely political in the sense that we were losing the channels to land mobile in the top 10 markets. **EM: Is it too much to say it was a scam? Mr. Abel:** I don't think it was a scam. There was an FCC proposal to give the channels to land mobile in the top 10 markets." *Electronic Media*, Oct. 26, 1998, at 30 ("Father of digital ponders his baby's future"). In authorizing HDTV, DTV and the dual channel transition scheme, the Commission already has made a public interest judgement - that allegedly more or better television is of greater public benefit than more, better, and lowered priced mobile phone service. Yet many consumers might disagree with the Commission's premise and prefer that the spectrum had been allocated for mobile service, especially as mobile Internet access explodes in popularity.

<sup>1/</sup> NAB at 12 (emphasis in original).

America's Voice have had to operate in a world without "certainty" and have had to assume entrepreneurial risk in borrowing money, hiring personnel, ordering equipment, and otherwise attempting to launch their services in a competitive environment for audience share and channel capacity.

NAB also suggests that the Commission must impose digital must carry *"as an incentive for consumers to purchase DTV sets."*<sup>8/</sup> This assertion appears to assume that consumers would not be motivated to purchase DTV sets in order to enjoy America's Voice on a digital service tier. America's Voice does not understand the basis for what appears to be an arrogant assumption that viewers will want to watch the fare offered by NAB's members on new DTV sets, but would not be similarly motivated by the programming carried on America's Voice.

Rather, America's Voice supports the Comments of Discovery Communications who point out that the Commission can maximize the amount of DTV programming that is available, and thereby maximize consumer incentives to purchase DTV sets, by forbearance from must carry, as broadcasters can distribute their DTV programming on their allocated DTV channels, while cable programmers are dependent upon digital cable channels for distribution.<sup>9/</sup> Duplication of broadcast DTV programming on cable channels and

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<sup>8/</sup> NAB at 7 (emphasis in original).

<sup>9/</sup> Comments of Discovery Communications at 10.

displacement of cable programming such as America's Voice will reduce, not increase, the amount of DTV programming available, and therefore reduce consumers' incentive to purchase DTV sets.

While NAB/MSTV/ALTS assert that the original purpose of must carry was to "preserve...free, local television", the new must carry rights they seek fit none of those goals.<sup>10/</sup> They are not seeking to "preserve" existing services, rather they are seeking to gain a competitive advantage over America's Voice in launching new broadcast networks and new digital broadcast services. By gaining must carry for advertiser supported channels, incentive fees that otherwise would have been paid for cable carriage (and which are paid by America's Voice to some cable systems) can be used to launch DTV subscription services, with the result that cable must carry is being used to cross-subsidize pay DTV. And the services they launch are not "local" in America's Voice's view, since they appear to consist primarily of syndicated entertainment programming as noted above.

Apparently recognizing that a public interest justification does not exist for imposition of digital must carry, certain broadcasters appear to support some middle ground regulatory scheme in which cable could add DTV signals on a "reasonably priced" new cable digital tier, rather than on the basic tier as

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<sup>10/</sup> NAB at i.

would be required under traditional must carry.<sup>11/</sup> But the digital service tier they target is precisely the tier where America's Voice hopes to expand its audience to include currently channel blocked cable systems. As such, Options 2-6 cannot escape the fatal Constitutional defects of Option 1, as shown herein. The Commission simply has no basis to favor one First Amendment speaker over another, on any cable tier.

Another concern of America's Voice is that certain technical proposals of the broadcasters would amount to "spectrum hogging" that would further detract from America's Voice's ability to access scarce cable spectrum. America's Voice supports Microsoft's Comments explaining the complex technical issues that must be worked out before cable systems could carry DTV signals: lack of end-to-end copyright protection, lack of Internet Protocol ("IP") standards for DTV needed to allow integrated service offerings, and the inherent problems with either pass-through or re-modulation.<sup>12/</sup> America's Voice is particularly

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<sup>11/</sup> MSTV Comments (hereafter "MSTV") at 51-56.

<sup>12/</sup> Pass through of the DTV signal would mean that only subscribers with a high end DTV set would be able to decode the signal, while a maximum amount of cable bandwidth would be taken away from other cable services that might be preferred by other subscribers. Re-modulation of DTV signals by the cable industry could provide in effect a down conversion to allow more subscribers to enjoy DTV, but cable and broadcasters would have to agree on standards for remodulation, and broadcasters' wish lists might conflict with cable, and cable subscribers, choice as to box costs and functions.

concerned about the amount of spectrum necessary to implement pass-through, and how it might deprive America's Voice of otherwise available carriage options. The Commission should not impose digital must carry "by the back door" by imposing so-called "compatibility standards" that have the effect of favoring broadcasters at the expense of America's Voice and other competing programmers.

**III. Digital Must Carry Would Be Unconstitutional As It Would Reduce The Number Of First Amendment Speakers And The Multiplicity Of Information Sources Sought By The Court.**

As shown in Part I above, America's Voice produces original programming that addresses issues of concern to viewers and voters, including call-in and e-mail-in programs that allow its audience to disseminate their views on these issues, while the new broadcast networks and independents tend to air syndicated entertainment programming and older re-runs. Under these circumstances, it is clear that displacing America's Voice or preventing it from obtaining a place on a new digital service tier, in order to favor the broadcasters, would reduce, not increase the number of First Amendment speakers and the multiplicity of information sources sought by the Supreme Court in *Turner II*.<sup>13/</sup>

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<sup>13/</sup> *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174 (1997).



A majority of the Court in *Turner II* did not find anti-competitive behavior on the part of cable as alleged by NAB, but based their decision upon the government's interest in preserving the content of over-the-air programming, leading the four dissenters to conclude, "Under these circumstances, the must-carry provisions should be subject to strict scrutiny, which they surely fail."<sup>14/</sup>

The Dissent noted that a Federal Trade Commission 1991 Study found that "most cable systems voluntarily carried broadcast stations with any reportable ratings in non-cable households...", leading the Dissent to conclude:

When appellees are pressed to explain the Government's "substantial interest" in preserving noncable viewers' access to "vulnerable" or "marginal" stations with "relatively small" audiences, it becomes evident that the interest has nothing to do with anticompetitive conduct, but has everything to do with content - preserving "quality" local programming that is "responsive" to community needs.<sup>15/</sup>

The concurring opinion of Justice Breyer was based upon an alleged need to preserve "a rich mix of over-the-air programming" in order to preserve "a multiplicity of information sources."<sup>16/</sup> The four dissenting Justices therefore concluded that a majority

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<sup>14/</sup> *Turner II*, 117 S. Ct. 1174, 1208 (1997).

<sup>15/</sup> *Turner II*, 117 S.Ct. at 1212.

<sup>16/</sup> *Id.* at 1204. Of course, Justice Breyer's vote was the critical fifth vote in upholding the constitutionality of analog must carry.

of the Court would agree that, "...[W]e [cannot] evaluate whether must-carry is necessary to serve an interest in preserving broadcast stations without examining the value of the stations protected...."<sup>17/</sup>

If the Commission were to somehow examine "the value" of the programming on America's Voice in comparison to "the value" of the programming on the new broadcast networks and most independents, the Commission would find that America's Voice carries network produced programming of a news and informational nature, including viewer participation programming, while the new broadcast networks and most independents carry syndicated entertainment programming and old "re-runs".<sup>18/</sup> Justice Breyer's interest in preserving "a multiplicity of information sources" would not be served by displacing America's Voice in favor of one of the new broadcast networks or the typical independent station.

Justice Breyer's use of the term "information sources" suggests programming of the type carried on America's Voice, i.e., programs that address public policy issues, not syndicated entertainment programs; programs that are current and include timely news, not old re-runs; and programs that provide an

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<sup>17/</sup> *Id.* at 1211.

<sup>18/</sup> Of course, the strict scrutiny test for content regulation is based upon the notion that the government cannot evaluate the relative "value" of various content, which is why strict scrutiny generally would invalidate any regulations that would attempt to do so, such as must carry regulations.

opportunity for viewer participation and expression of views on important public issues, not passive entertainment.

It is no answer to say that cable channel capacity is increasing and therefore America's Voice need not be concerned about the potential channel blocking effect of must carry. While NAB submits a study purporting to show that cable channel capacity is expanding and the burden of must carry is declining, including that one 6 MHz channel can carry two HDTV signals,<sup>19/</sup> what purports to be a scholarly study is entirely misleading.<sup>20/</sup> America's Voice is counting on new digital capacity to obtain carriage on currently channel blocked systems, and knows from experience that even with the addition of new digital channels, the number of competing programmers will outstrip the available channel space and carriage will remain highly competitive.

It also is no answer to say that must carry was passed by Congress in 1992 and the Commission has no authority to determine whether digital must carry is justified. To follow the

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<sup>19/</sup> NAB, Appendix D.

<sup>20/</sup> History has shown that as cable system capacity has expanded, the number of program services also has grown and, in fact, has continued to outstrip channel availability. Manipulation of statistical averages cannot overcome common sense and experience: numerous cable program services continue to seek carriage as any new cable channels become available and these services have equal merit with any of the program offerings of the broadcasters which may lack local content.

suggestion in the Statement of Jenner & Block ("J&B"),<sup>21/</sup> that a legislative record cannot be revisited and the Commission must follow existing statutes and rules regardless of changed circumstances, in the past has led to reversal of the Commission by the Court of Appeals:

Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation. We hold that the Commission is statutorily bound to determine whether that linkage now exists.<sup>22/</sup>

The fundamental precepts of *Turner* would become subject to reconsideration, and analog must carry may be invalidated, in the event the Commission substantially revises the must carry rules as urged by the broadcasters.

At the risk of stating the obvious, the explosion in Internet usage since 1992 has proliferated the number of First Amendment voices and drastically reduced the barriers to entry in

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<sup>21/</sup> NAB, Appendix A, at 12-15. Mischaracterization of a partisan legal argument as a "Statement" is inappropriate.

<sup>22/</sup> *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (footnotes omitted). Notably absent from J&B's "Statement" is any citation to any case involving the Commission. J&B appears to rely solely upon two cases involving municipal regulation of sexually oriented businesses. *Id.* at 13.

gaining wide dissemination of any particular point of view.<sup>23/</sup> Also, since 1992, cable operators have become subject to increased competition from DBS and medium powered satellite and private cable as a result of developments in digital technology (DBS compression technology, for example, is digital), demonstrating that digital technology is making available "a multiplicity of information sources", regardless of any DTV must carry requirement.<sup>24/</sup>

Changes in technology over the intervening years also would require reconsideration of the Court's view of the viability of

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<sup>23/</sup> The fact that non-cable households may obtain information from the Internet undercuts their need to rely upon broadcast media. Increasing use of the Internet recently was described by Steve Case of America Online in the following terms. "**EM:** *Is AOL a rival to the broadcast networks as the new mass medium?* **Mr. Case:** It's wrong to look at this new medium through the prism of technology or historical separation between industries. The most striking statistic about AOL is not that we have gone from 200,000 members when we went public six years ago to 13 million members today, but that we've gone from customers using us an average three hours a month to an average 25 hours a month. As people use more time on the Internet, they will devote less time to other things like television." *Electronic Media*, Nov. 9, 1998, at 32 ("Still a cyber-pioneer").

<sup>24/</sup> Broadcasters want cable to be required to "pass through" every advertiser supported service offered by every broadcaster by any digital methodology. For example, cable would be required to "pass through" advertiser supported broadcast Internet services or "webcasts," according to the broadcaster formulation that only pay or subscription services are excludable and every advertiser supported service must be passed through. Thus, the Commission is being asked to displace cable programmers such as America's Voice at least in part for the purpose of allowing broadcasters to launch new data services and other non-video services, so long as they are advertiser supported, according to the Broadcasters.

the so-called "A/B" switch as an alternative, and less constitutionally intrusive, remedy. America's Voice supports the comments of several cable commenters who noted that multiple input ports and built in selector switches are now included even in moderately priced NTSC sets.<sup>25/</sup> Therefore, consumers who are interested in receiving broadcast DTV can join to their sets the necessary antenna and decoder inputs and switch seamlessly between those inputs and their cable service.<sup>26/</sup> It is no answer to say that off air reception of DTV is inadequate. The justification for must carry was preservation of free television signals for non-cable subscribers. A non-cable subscriber who cannot receive an off-air DTV signal in a given location gains nothing by delivery of the signal to cable subscribers.

Since the passage of the must carry law, the number of "independent" stations has declined - not because of lack of cable carriage, but because of the acquisition of these stations by new broadcast networks, several of which have been launched since 1992. A new record on digital must carry would have to reflect that the new broadcast networks have used the acquisition of fringe stations, coupled with the must carry law, to gain an

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<sup>25/</sup> E.g., Time Warner at 6; Discovery at 10 and 25.

<sup>26/</sup> Notably the broadcasters have not regarded the inconvenience of switching between inputs as a justification to allow DBS to deliver out of market broadcast signals.

advantage over other cable programmers such as America's Voice in launching their program services on cable.

Although cable was characterized as engaging in "anti-competitive" conduct by the proponents of must carry and four of the Justices in *Turner II*, cable programmers such as America's Voice regard the broadcasters' position as anti-competitive today. Simply put, new broadcast networks and independent stations should have to compete with America's Voice for cable carriage in a free market without government content regulation.

In any reconsideration of the must carry law by the Commission or the Court, the reality of what has occurred since 1992 cannot be ignored and it appears doubtful that even the current analog must carry law now would be approved under an intermediate scrutiny test. Certainly the broad expansion sought by the broadcasters is without question unconstitutional.

**IV. The Must Carry Statute Does Not Require The Commission To Adopt Digital Must Carry During The Transition, A Plain Reading Is Entirely Consistent With A Hands-Off Approach.**

As shown above, the imposition of digital must carry would be unconstitutional, as well as bad public policy. Nothing in the must carry statute requires the Commission to proceed with digital must carry, despite the claims of the broadcasters.

**A. Section 614(a) and (h) (1) (A) Does Not Authorize Dual Must Carry.**

The Broadcasters argue that Sections 614(a) and (h) (1) (A) require dual carriage of both analog and digital signals of every

commercial TV station and the Commission basically has no discretion in this rulemaking, in fact, Paxson argues the Commission cannot even conduct this rulemaking.<sup>27/</sup> These assertions are at odds with the plain and unambiguous language of the statute.

Section 614(a) requires carriage of "the signals of local commercial television stations."<sup>28/</sup> Although the term "signals" is used in the plural, this is not dispositive because the term "stations" also is used in the plural. In order to determine whether Congress intended for cable systems to carry multiple signals from a single station, Section 614(a) must be read together with the definition of a station.

Section 614(h)(1)(A) defines "a local commercial television station" for purposes of Section 614 as "any full power . . . station . . . licensed and operating on **a** channel **regularly assigned** to its community by the Commission . . . ."<sup>29/</sup> Note two things. First, the statute refers to "**a**" channel - not dual or multiple channels. Second, the statute refers to a channel "**regularly assigned.**" The assignment of two channels to each

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<sup>27/</sup> *E.g.*, NAB at 3-6; Paxson Comments (hereafter "Paxson") at 12.

<sup>28/</sup> 47 U.S.C. §534(a).

<sup>29/</sup> 47 U.S.C. §534(h)(1)(A) (emphasis added).



station is not "regular," on the contrary, it is a temporary, transitional assignment only.<sup>30/</sup>

Thus, the words of the must carry statute, read without need for any special administrative expertise, by their plain, simple and unambiguous meaning, only permit the Commission to require carriage of "a", i.e. one, channel of each station, and only a channel "regularly assigned" - not a dual channel specially assigned during a limited transition period. Not until the Broadcasters have turned in one of their two transition channels will the remaining DTV channel be their "regularly assigned" channel entitled to must carry status under Section 614(a) and (h) (1) (A) .

**B. Dual Must Carry Is Inconsistent With Virtually Every Provision Of The Must Carry Statute.**

Dual must carry of analog and digital signals during the transition period before consumers have replaced their NTSC receivers with new digital receivers would be inconsistent with the provisions of the must carry statute.

**Signal availability** - Section 614(b) (7) requires that must carry signals be provided to "every subscriber" and be viewable

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<sup>30/</sup> America's Voice need not belabor the point that the assignment of two channels to each television station is an extraordinary, unprecedented circumstance in the history of this Commission - and not a regular channel assignment by any stretch of the imagination. The Broadcasters attempted reading of this provision ignores not only its plain meaning, but the entire record of this Commission's activities since 1934.

on "all television receivers."<sup>31/</sup> This would require cable to provide a down converter to every subscriber for every television set. It would undercut the market for digital receivers and delay the return of the analog spectrum. It would impose an immense financial burden compared to cable's market place plan to roll-out digital STB's only to those who subscribe to a new digital service tier.

**Basic tier** - Section 623(b)(7)(i) requires that the basic tier include "all signals carried in fulfillment of the requirements of Sections 614 and 615," i.e., all must-carry signals.<sup>32/</sup> This would require cable to provide DTV signals on the basic tier, rather than cable's plan for a digital tier roll-out, with the cost imposed upon basic cable subscribers, rather than digital tier "early adapters".

**Channel positioning** - Section 614(b)(6) requires "each channel" carried under the must carry rule to be carried "on the cable system channel number on which the local commercial television station is broadcast over the air . . . ."<sup>33/</sup> This would severely disrupt cable channel line-ups, if applied according to its plain meaning. Broadcasters apparently want to rewrite this and require carriage of digital channels at the same

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<sup>31/</sup> 47 U.S.C. §534(b)(7).

<sup>32/</sup> 47 U.S.C. §543(b)(7)(i).

<sup>33/</sup> 47 U.S.C. §534(b)(6).

position as the existing analog channel, i.e., Ch. 4 for analog, and 4.1, 4.2, 4.3 etc. for digital.<sup>34/</sup> No statutory basis exists for such channel shifting or linking, as the statute refers only to "the cable system channel number"<sup>35/</sup> that corresponds to the station's over the air channel number.

**Primary signal** - Section 614(b)(3)(A) only requires cable to carry a broadcaster's "primary video" signal.<sup>36/</sup> The Broadcasters want to rewrite this provision to require carriage of the entire digital bit stream - except pay services. The Broadcasters want headends and cable boxes to include complex navigation software that would allow broadcasters to:

1. Use cable channel numbers that may not in fact correspond to over the air numbers, as noted above;
2. pass through broadcaster generated program guides; and
3. allow broadcasters to switch at will between HDTV and multiplexed DTV signals.<sup>37/</sup>

This wish list has nothing to do with "preserv[ing]...free, local television".<sup>38/</sup> It has everything to do with giving new programming and new program guides to be created by the Broadcasters a competitive advantage vis-a-vis cable programmers and cable program guide creators - at the same time that

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<sup>34/</sup> ALTS at 73-75; MSTV at 32-35.

<sup>35/</sup> Note that it refers to the "number" not "numbers".

<sup>36/</sup> 47 U.S.C. §534(b)(3)(A).

<sup>37/</sup> E.g., ALTS at 73; MSTV at 32-37.

<sup>38/</sup> NAB at i.

Broadcasters also will be launching subscription services that they presumably would link to and promote on their "free" channels - and with no assurance that any of these new services will be "local" in nature.<sup>39/</sup>

**A Plain Reading of the Statute as a Whole** - Dual must carry of analog and digital signals is inconsistent with all of the above provisions of the must carry statute, as the Broadcasters in effect admit by asking the Commission to rewrite these provisions to reconcile the inconsistencies in a manner favorable to the Broadcasters.<sup>40/</sup> The only statutory basis for making revisions to the must carry rules is Section 614(b)(4), the "Signal Quality" provision that authorizes the Commission to

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<sup>39/</sup> The request for carriage of broadcasters' "program guides" is inconsistent with the statute. The statute requires carriage only of "program-related material" and specifically allows cable operators to exclude "other material...or other nonprogram related material (including teletext and other subscription and advertiser-supported information services)." 47 U.S.C. §534(b)(3). "Program-related material" means material related to the specific television program with which material is broadcast; it does not mean a general program guide covering other programs or signals of the broadcaster, and certainly not a guide covering channels of other parties.

<sup>40/</sup> While Broadcasters ask the Commission liberally to rewrite several provisions of the statute, they urge a narrow reading of the non-duplication provision, 47 U.S.C. §534(b)(5), arguing it applies only to two different stations, not to duplicative signals of the same station. Paxson at 29-30. But the policy behind non-duplication clearly is implicated where the transition scheme is premised upon increasing, and eventually 100% simulcasting. Multi-casting of other non-simulcast services is not an answer as it contradicts the statutory limitation of cable's obligation to carry only the "primary video". 47 U.S.C. §534(b)(3).

commence a proceeding to revise the must carry rules as necessary to ensure cable carriage of signals, "which have been changed" to conform to the new DTV standards.<sup>41/</sup>

However, the Broadcasters attempt to rely upon this provision to rewrite the remainder of the must carry statute is impermissible, since the plain meaning of the statute allows all of its provisions to be reconciled, namely, that must carry will apply only when broadcasters have returned their analog channels, and not during the transition period, as stated in Option 7. After the transition period is over, broadcasters signals will "have been changed" consistent with Section 614(b)(4)(B). Cable hopefully will be able to make DTV channels available to all of their subscribers and to all of their subscribers' television receivers and will be able to carry the signals on the basic tier because consumers will have transitioned to digital. The digital channel will be the primary video signal of the broadcaster and the channel position issues largely will be self-resolved, as broadcasters will have settled on one channel and returned the other. The statute makes sense when read to apply after the transition is complete, but the Broadcasters attempt prematurely to apply it during the transition period cannot be reconciled with its plain meaning.

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<sup>41/</sup> 47 U.S.C. §543(b)(4)(B).

**V. CONCLUSION.**

For the reasons stated herein, America's Voice believe that Option 7 is the only constitutionally and statutorily permissible option. The Commission simply should allow broadcasters to transfer must carry rights from analog channels to digital channels when they return their analog channels to the Commission.

Respectfully submitted,

AMERICA'S VOICE, INC.



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December 22, 1998

Their Counsel

**CERTIFICATE OF SERVICE**

I, Magdalene Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 22nd day of December 1998, served by hand delivery or first-class mail, postage pre-paid, a copy of the foregoing "Reply Comments" to:

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Chairman	Cable Services Bureau
FCC	FCC
1919 M Street, N.W., Room 814	2033 M Street, N.W., Room 918A
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The Honorable Susan Ness *	William H. Johnson *
Commissioner	Deputy Bureau Chief
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1919 M Street, N.W., Room 832	FCC
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Commissioner	Mass Media Bureau
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